

**DECISION**

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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548  
*122*  
**8322**

FILE: B-193212

DATE: November 9, 1978

MATTER OF: Delphi Industries Inc.

**DIGEST:**

Determination to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and Small Business Administration and will not be reviewed by GAO in absence of showing of fraud or bad faith on part of Government officials.

Delphi Industries Inc. (Delphi) protested the proposed noncompetitive award of a contract for reusable metal containers by the Department of Defense (solicitation No. F08635-78-R-0308) under section 8(a) of the Small Business Act, 15 U.S.C. § 635(a)(1) (1976). Delphi contends that the setting aside of this requirement for minority businesses is improper since it will result in excessive costs to the Government, as well as cause a major economic hardship to Delphi.

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with any Government agency having procurement powers. The contracting officer of such agency is authorized "in his discretion" to let the contract to the SBA "upon such terms and conditions" as may be agreed upon between the SBA and the procuring agency. 53 Comp. Gen. 143 (1973). Therefore, we have recognized that the determination to initiate a set-aside under section 8(a) and to dispense with competition is a matter for the contracting agency and the SBA to decide. Data Controls/North, Inc., B-192342, July 21, 1978, 78-2 CPD 62. In view of the broad discretion vested in the contracting officer, we do not review determinations to set aside a procurement under section 8(a) unless the protester shows fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith. Data Controls/North, Inc., *supra*; Poli-Com, Inc., B-190030, March 16, 1978, 78-1 CPD 211; Chemical Technology, Inc., B-190165, January 18, 1978, 78-1 CPD 46; A.R. & S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186. No such showing has been made here.

We point out that the section 8(a) program is designed to encourage the fostering and promotion of minority business enterprises and has been upheld by the courts. Ray Paillic Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973). The fact that the program operates to the monetary detriment of a particular nonminority firm does not affect the validity of the program or of a specific set-aside. See Chemical Technology, Inc., supra.

The protest is dismissed.

*Milton J. Socolar*

Milton J. Socolar  
General Counsel



UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

IN REPLY  
REFER TO:

J-193212

November 9, 1978

8322

The Honorable Frank Church  
United States Senate

Dear Senator Church:

By communications of October 6 and 17, 1978, you expressed interest in the protests filed in this Office by Delphi Industries, Inc. (Delphi). Delphi has filed two separate protests. The first challenged the propriety of the Air Force's award of letter contract FO8635-78-C-0227 for storage containers to Metric Systems Corporation without competitive bidding. The second protest questioned the propriety of the proposed noncompetitive award of a contract for reusable metal containers by the Department of the Air Force (RFP FO8635-78-R-0308) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1976).

By decision of today, copy enclosed, our Office advised Delphi that its protest relating to the proposed minority business set-aside under section 8(a) of the Small Business Act has been dismissed. We do not review determinations to set aside a procurement under section 8(a) in the absence of a showing of fraud or bad faith on the part of Government officials.

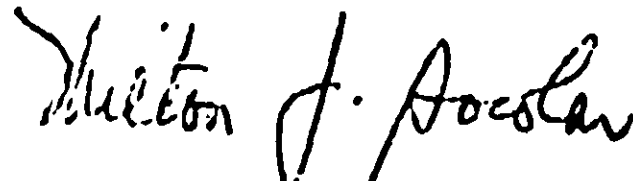
With regard to Delphi's protest concerning the noncompetitive award of a contract to Metric Systems Corporation, our Office will review the matter. In accordance with our Bid Protest Procedures, copy enclosed, we have requested a report from the Air Force.

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As soon as possible after full consideration of the matter we will advise you of our decision.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Socolar".

Milton J. Socolar  
General Counsel

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